93-471

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COY U. SPAWN, JR.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Under the Supreme Court's "commercial activities" test in *Loeffler v. Frank*, must the Federal Deposit Insurance Corporation pay a depositor pre-judgment interest on wrongfully withheld deposit insurance?

2. In an Equal Access to Justice Act trial on remand, does a District Court which concludes on the evidence that a governmental agency did not meet its burden of proof on "substantial justification" and relies on a Court of Appeal's "arbitrary and capricious" finding against the governmental agency on the merits, commit an abuse of discretion allowing the Court of Appeals to substitute its opinion for the District Court's fact findings?

RULE 14.1(b) LIST OF PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals and other courts below are:

COY U. SPAWN, JR., Petitioner,

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent.

Western Bank-Westheimer was the financial institution liquidated by the FDIC and has been dismissed from the Case.

There are no corporations or other government agencies who are parties to this proceeding.

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APPENDIX C: *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp.* - Fifth Circuit Order Denying Petition for Rehearing [Filed June 21, 1993].

APPENDIX D: *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp.* - Excerpt of Trial Transcript of U.S. District Court EAJA Trial, August 21, 1991: District Judges questions to Plaintiff and FDIC on substantial justification subsequent to parties resting (pp.102-108).

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IN THE
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OCTOBER TERM, 1993

COY U. SPAWN, JR.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, COY U. SPAWN, JR., respectfully prays that this Court grant this Petition for Writ of Certiorari to resolve two FDIC and RTC deposit insurance issues.

1. Under the Supreme Court's "commercial activities" test in *Loeffler v. Frank*, must the Federal Deposit Insurance Corporation pay a depositor pre-judgment interest on wrongfully withheld deposit insurance?

The Court is requested to resolve the conflict between the Fifth Circuit Court of Appeals, the D.C. Circuit Court of Appeals and the Federal Circuit Court of Appeals, and to clarify the application of *Loeffler v. Frank* to agencies

other than the U.S. Postal Service and to causes of action other than Title VII suits.

2. In an Equal Access to Justice Act trial on remand, does a District Court which concludes on the evidence that a governmental agency did not meet its burden of proof on "substantial justification" and relies on a Court of Appeal's "arbitrary and capricious" finding against the governmental agency on the merits, commit an abuse of discretion allowing the Court of Appeals to substitute its opinion for the District Court's fact findings?

Petitioner requests this Court to resolve the conflict between the Fifth Circuit Court of Appeals and First Circuit Court of Appeals, and clarify the application of *Pierce v. Underwood* to the EAJA standard of review and burden of proof on "substantial justification" for a governmental agency's position which has been reversed on the merits as "arbitrary and capricious," or "not in accordance with the law."

OPINIONS BELOW

The United States District Court's Findings of Fact and Conclusions of Law stated orally into the record are reproduced as Appendix B.

The Fifth Circuit Court of Appeals' Opinion is reported as *Spawn v. Western Bank - Westheimer & FDIC*, 989 F.2d 830 (5th Cir.1993), *reh'g den'd* and is reproduced as Appendix A.

JURISDICTION

The Fifth Circuit Court of Appeals' Judgment and Opinion were filed on May 4, 1993.

The Fifth Circuit Court of Appeals' denial of rehearing was filed on June 21, 1993.

This Court has jurisdiction to review the judgment and opinion of the Fifth Circuit Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES & REGULATIONS INVOLVED IN THIS CASE

1. **12 U.S.C. § 1819 (Fourth).**

   Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power to sue and be sued, complain and defend, in any court of law or equity, state or federal.

2. **12 U.S.C. § 1821(a)(1982).**

   The Corporation shall insure the deposits of all insured depository institutions as provided in this chapter. The maximum amount of the insured deposit of any depositor shall be $100,000.

3. **12 U.S.C. § 1822(b)(1982).**

   Payment of insured deposit as discharge from liability

Payment of an insured deposit to any person by the Corporation shall discharge the Corporation, and payment of a transferred deposit to any person by the new bank or by an insured depository institution in which a transferred deposit has been made available shall discharge the Corporation and such new bank or other insured depository institution, to the same extent that payment to such person by the depository institution in default would have discharged it from liability for the insured deposit.

4. **28 U.S.C. § 2412(d)(1)(A)(1980).**

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

5. **28 U.S.C. § 2412(d)(1)(B)(1980).**

A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees

and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

6. **12 C.F.R. 330.9(b)(1987).**

Qualifying joint accounts. A joint deposit account shall be deemed to exist, for purposes of insurance of accounts, only if each co-owner has personally executed a deposit account signature card and possesses withdrawal rights. The restrictions of this paragraph shall not apply to co-owners of a time certificate of deposit or to any deposit obligation evidenced by a negotiable instrument, but such a deposit must in fact be jointly owned.

STATEMENT OF THE CASE

1. In July, 1986 Mr. Coy U. Spawn, Jr. deposited $100,000.00 of his separately owned funds into Western

Bank - Westheimer, and his sister deposited $100,000.00 of her separately owned funds into the same financial institution.

2. On October 1, 1987, the Texas State Banking Commissioner declared Western Bank - Westheimer insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver for this Texas state chartered bank.

3. On or before October 2, 1987, the FDIC determined that Mr. Spawn's certificate of deposit in the amount of $100,000.00 was uninsured. By October 3, 1987, the FDIC paid those deposits which the FDIC determined to be insured deposits.

4. Subsequently, Mr. Spawn sued the FDIC in federal district court for the $100,000.00 principal amount, plus pre-petition interest, plus attorney's fees under the Equal Access to Justice Act ("EAJA").

5. The Federal District Court, the Honorable Sim Lake presiding, granted summary judgment in favor of the FDIC. Mr. Spawn appealed to the Fifth Circuit of Appeals. The legal issue was whether the relevant regulations allowed the FDIC to aggregate the siblings' two $100,000 certificate of deposits which were "joint with right of survivorship" accounts based on equal withdrawal rights, or required the FDIC to determine the actual ownership of the certificate of deposit accounts.

6. On appeal, the Fifth Circuit reversed and remanded the case to the district court for a determination of whether Mr. Spawn's certificate of deposit, although styled as a joint tenancy with the right of survivorship with

his sister, was in fact an account separately owned by him and therefore separately insurable by the FDIC up to $100,000.00. *Spawn v. Western Bank - Westheimer and Federal Insurance Corp.*, 925 F.2d at 885 (5th Cir.1991) (hereinafter *"Spawn I"*).

7. The second sentence of one of the regulations on which the FDIC principally relied to aggregate both accounts into one $100,000 insured deposit provided: "The restrictions of this paragraph shall not apply to co-owners of a **time certificate of deposit** or to any deposit obligation evidenced by a negotiable instrument, **but such a deposit must in fact be jointly owned.**" 12 C.F.R. 330.9 (1987) (emphasis added).

8. The Fifth Circuit agreed with the FDIC's position with respect to accounts in general, but held that the second sentence of the regulation "**plainly established**" a different test for certificate of deposit accounts. *Spawn I*, 925 F.2d at 888. Upon an analysis of all the regulations at issue, the Fifth Circuit summarized that: " ... the FDIC's interpretation of the regulations at issue contradicts the **unambiguously expressed** directions they contain." *Spawn I*, 925 F.2d at 889 (emphasis added). Accordingly, the Fifth Circuit reversed under the "arbitrary and capricious" or "not in accordance with the law" standard of review.

9. On remand after *Spawn I* and just before trial, the FDIC acknowledged and stipulated that Mr. Spawn solely owned the deposit at issue, and thus was entitled to deposit insurance in the amount of $100,000 separate from his sister's deposit of $100,000. However, the FDIC denied Mr. Spawn Equal Access to Justice Act ("EAJA") attorney's fees and denied Mr. Spawn interest on the wrongfully withheld deposit.

10. On August 21, 1991, the District Court, the Honorable Sim Lake again presiding, held an evidentiary trial on the merits of the EAJA issues and interest issues. The District Court entered judgment in favor of Mr. Spawn for: the $100,000.00 principal amount of the insured deposit owned by Mr. Spawn; $43,834.99 for EAJA attorney's fees; $4,215.47 for reasonable costs and expenses under the EAJA; $39,061.07 for prejudgment interest from the date the deposit would have been paid if the FDIC originally had determined Mr. Spawn to be insured, through the date of trial; and post-judgment interest pursuant to 28 U.S.C. § 1961.

11. The District Court took into evidence approximately twenty-five exhibits and heard oral testimony regarding "substantial justification", "bad faith", and other EAJA issues, with the majority of the testimony being from Ms. Margaret L. Martin, the FDIC officer who made the original decision to deny Mr. Spawn deposit insurance, and from Mr. Coy U. Spawn, Jr., the depositor. (Trial Transcript, pp. 7-78).

12. Subsequent to the parties resting, the District Judge specifically asked and discussed with the FDIC the justification for its position under the second sentence of Section 330.9(b). (Trial Transcript, pp. 105-108. See Appendix "D").

13. The District Judge stated in conclusion of law numbers one and two the burden of proof, the definition and application of the term "substantially justified", and that the EAJA determination was based on the entire record pursuant to *Pierce v. Underwood*. (Trial Transcript. pp. 111 & 112. See Appendix "B".)

14. The first sentence of the District Court's first fact finding is: "FDIC has not established that its position was substantially justified." (Trial Transcript, p. 112. See Appendix "B"). The District Court then explained that because he did not have any conclusive evidence that FDIC was substantially justified and the Fifth Circuit held that the FDIC's position was arbitrary and capricious or otherwise not in accordance with the law, that he was awarding EAJA attorney's fees to the prevailing party. (Trial Transcript p. 112. See Appendix "B").

15. The District Court concluded as a matter of law that pursuant to the Supreme Court's *Loeffler v. Frank* opinion that Congress had intended to waive the FDIC's sovereign immunity from suit on deposit insurance determinations, and all incidents to suit including pre-judgment interest.

16. The FDIC appealed the award of pre-judgment interest, and also the award of EAJA attorney's fees on grounds that FDIC was substantially justified in its interpretation of the regulation. The Fifth Circuit of Appeals reversed. *Spawn v. Western Bank - Westheimer & Federal Deposit Insurance Corp.*, 989 F.2d 830 (5th Cir.1993)(*Spawn II*).

17. Mr. Spawn now files this Petition for a Writ of Certiorari to the Fifth Circuit on *Spawn II*.

FEDERAL JURISDICTION IN THE COURTS BELOW

The United States District Court had jurisdiction pursuant to 12 U.S.C. §§ 1819, 1811 (1982).

The United States Court of Appeals for the Fifth Circuit had jurisdiction to review the District Court judgment and opinion pursuant to 28 U.S.C. § 1291.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

I. FDIC Immunity from Pre-judgment for Wrongfully Withheld Deposit Insurance.

The first question for this Court's consideration is whether the Federal Deposit Insurance Corporation must pay a depositor pre-judgment on wrongfully withheld deposit insurance under the "commercial activities" test set forth by this Court in *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1945, 100 L.Ed.2d 549 (1988). Petitioner requests this Court to resolve the conflict between the Fifth Circuit Court of Appeals, the D.C. Circuit Court of Appeals and the Federal Circuit Court of Appeals, and to clarify the application of *Loeffler v. Frank* to agencies other than the United States Postal Service and to causes of action other than Title VII suits.

Application and Clarification of Loeffler v. Frank to the FDIC and Deposit Insurance Determinations.

Loeffler v. Frank provides the "commercial activities" waiver of sovereign immunity for "sue and be sued" governmental agencies which Congress has authorized to engage in commercial and business transactions with the public. *Id.* This Court has established that a governmental agency which Congress: (1) has launched "into the commercial world"; and (2) has included a sue-and-be-sued clause in its charter; and (3) has not expressly delimited the

"sue and be sued" clause with regard to interest awards, is liable for pre-judgment interest to the extent that interest is recoverable against a private party as a normal incident of suit. *Loeffler*, 486 U.S. at 556-7, 108 S.Ct. at 1969-1970, 100 L.Ed.2d at 558.

In *Loeffler*, the governmental agency was the United States Postal Service and the cause of action was a Title VII discrimination suit under the Civil Rights Act of 1964. Several district courts have held that *Loeffler* applies to the FDIC and Resolution Trust Corporation ("RTC"), and have accordingly awarded pre-judgment interest on wrongfully withheld deposit insurance. However, the Circuit Court of Appeals have split on this issue.

The Conflict Between the Circuits.

The D.C. Circuit Court of Appeals held that: "Mindful of the general rule that the United States is not liable for interest on claims against it in the absence of statute or contract, we are satisfied that the rule is not applicable to this situation. ... FSLIC is a separate corporate body, invested with powers, duties, and responsibilities which, in the judgment of Congress require that it have the power to sue and be sued under 12 U.S.C. s 1725(c)(4); also, FSLIC is in the insurance business and is assumed to have accepted the ordinary incidents of suits in such business." *North New York Sav. Bank v. Federal Sav. & Loan Ins. Corp.*, 515 F.2d 1355, 1364 (D.C. Cir. 1975).

The Fifth Circuit specifically disagreed with the D.C. Circuit, *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp., 989 F.2d 830, 838* (5th Cir. 1993) (hereinafter *"Spawn II"*), and held that the FDIC is immune from prejudgment interest awards in the context erroneous

deposit insurance determinations. *Id* at 838. "In our view, the FDIC is not engaged in a commercial enterprise when it acts as insurer of deposits, but rather as a protector of the banking system and the general welfare." *Spawn II*, 989 F.2d at 838.

This holding conflicts with the Federal Circuit Court of Appeals. "The FDIC's statutory authorization to sue and be sued in any state or federal court accommodates the commercial and business context in which this agency operates." *Far West Federal Bank v. Office of Thrift Supervision & Federal Deposit Ins. Corp.*, 930 F.2d 883, 888 (Fed. Cir. 1991). The Federal Circuit applied *Federal Housing Admin, Region No. 4 v. Burr*, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed.2d 724 (1940), the predecessor to *Loeffler*, to hold that the FDIC's "sue and be sued" clause was intended by Congress to waive the FDIC's sovereign immunity from suit and that such waiver included all ordinary incidents of suit, including the equitable relief of recision and restitution. *Far West Federal*, 930 F.2d at 888-9 (citing *North New York Savings* with approval).

The Fifth Circuit purports to follow the Tenth Circuit in *Philadelphia Gear* in holding that the FDIC is immune from prejudgment interest on erroneous deposit insurance determinations. However, *Philadelphia Gear* involved only an express waiver of sovereign immunity analysis and did not discuss the "commercial enterprise exception" to waiver of sovereign immunity. *Philadelphia Gear Corp. v. Federal Deposit Ins. Corp.*, 751 F.2d 1131 (10th Cir. 1984), rev'd on other grounds, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986). Thus, the Tenth Circuit cannot be properly included as a circuit having ruled on this first issue presented in this Application for a Writ of Certiorari.

The Importance to the Public: Depositors Need a Uniform Rule on Deposit Insurance.

The general public needs to know whether, as a depositor in an FDIC insured financial institution, they are entitled to interest on their deposit in the event the FDIC erroneously determines that their deposit is uninsured. Depositors trade a decreased interest return on their money for a perceived increased security of their money, as opposed to higher interest bearing but potentially higher risk investments with uninsured institutions such as insurance companies. Due to the time value of money, the general public is entitled to know whether and under what circumstances such insurance includes interest to compensate for a delay in receiving their money subsequent to a bank being closed.

More importantly, the disparity among the circuits is patently unfair to the general public. Currently, insured depositors in Washington, D.C. are entitled to interest on wrongfully determined deposit insurance, and insured depositors in the Fifth Circuit are not. This issue requires a uniform rule. Petitioner requests this Court to provide this rule.

Although the FDIC recently repaid the United States Treasury all the funds which the FDIC borrowed since 1990 together with interest, the FDIC will not pay interest on deposit insurance wrongfully determined and withheld from an insured depositor, without court order. Petitioner respectfully requests this Court to provide this order.

II. The Abuse of Discretion Standard of Review and Agencies' Burden of Proof on "Substantial Justification" of an Agency Position Which was Held to be "Arbitrary and Capricious".

The second question for this Court's consideration is whether in an EAJA trial on remand, a District Court which concludes on the evidence that a governmental agency did not meet its burden of proof on "substantial justification" and relies on a Court of Appeal's "arbitrary and capricious" finding against the governmental agency on the merits, commits an abuse of discretion allowing the Court of Appeals to substitute its opinion for the District Court's fact findings? Petitioner requests this Court to resolve the conflict between the Fifth Circuit Court of Appeals and First Circuit Court of Appeals, and to clarify the application of *Pierce v. Underwood* to the EAJA standard of review and burden of proof on "substantial justification" for a governmental agency's position which has been reversed on the merits as "arbitrary and capricious" or "not in accordance with the law". Is the "arbitrary and capricious" holding on the merits part of the record to be considered pursuant to 28 U.S.C. § 2412(d)(1)(B) in determining "substantial justification"?

Application and Clarification of Pierce v. Underwood to "Substantial Justification" for a Governmental Agency's Position which has been Reversed on the Merits as "Arbitrary and Capricious" or "Not in Accordance with the Law."

"*Pierce v. Underwood* establishes an "abuse of discretion" standard of review of a District Court's "substantial justification" determination. *Pierce v.*

Underwood, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) "Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts." *Pierce*, 108 S.Ct. at 2547. "In addition to furthering the goals we have described, it will implement our view that a "request for attorney's fees should not result in a second major litigation." *Pierce*, 108 S.Ct. at 2549 (citation omitted). In *Pierce*, the original district court judgments were against the government and were not on an "arbitrary and capricious" standard of reviewing agency action.

This Case presents a common fact pattern which arises when the district court rules in favor of the governmental agency on the merits, a Court of Appeals reverses on grounds that the governmental agency's position was "arbitrary and capricious" or "not in accordance with the law", and then on remand or otherwise the Plaintiff files an EAJA suit in the district court. This fact pattern complicates the EAJA determination with the interaction of: an "arbitrary and capricious" position versus a "substantially justified" position; the effect of an initial governmental agency victory in district court on the merits; and a governmental agency's burden of proof to explain or justify a position which has been rejected by the court of appeals as contradicting the unambiguously expressed directions of the plain language of the regulation. The ultimate issue is whether a district court which holds an evidentiary EAJA trial, concludes that the governmental agency has not met its burden of proof, and then relies on the previous "arbitrary and capricious" or "not in accordance with the law" finding to award attorney's fees to the prevailing party, has committed an abuse of discretion. The circuit court of appeals have split on this issue. The question hinges on a question of law: whether the "arbitrary and capricious"

holding on the merits is part of the record to be considered on "substantial justification" pursuant to 28 U.S.C. § 2412(d)(1)(B).

In this Case, the District Court, held an evidentiary trial on the merits of the EAJA issues. The district court took into evidence approximately twenty-five exhibits and heard oral testimony from the FDIC and the depositor regarding "substantial justification", "bad faith", and other EAJA issues. (Trial Transcript, pp. 7-78).

The District Judge stated in conclusion of law numbers one and two the burden of proof, the definition and application of the term "substantially justified", and that the EAJA determination was based on the entire record pursuant to *Pierce v. Underwood*. (Trial Transcript. pp. 111 & 112. See Appendix "B".)

Subsequent to the parties resting, the District Judge specifically asked and discussed with the FDIC the justification for its position under the second sentence of Section 330.9(b). (Trial Transcript, p. 105-108. See Appendix "D"). Judge Lake began the conversation with:

> "The Fifth Circuit didn't have any opinion finding that the FDIC's interpretation was an abuse of discretion, which indicates to me perhaps a reasonable person wouldn't have reached that decision. How does the FDIC justify its interpretation of 330.9(B) as being controlled by 330.1(B)(1)?"

(Trial Transcript, p. 105. See Appendix B.)

The Conflict Between the First and Fifth Circuits.

In reviewing the EAJA Trial in this Case, the Fifth Circuit held that deference to the District Court's fact findings was not necessary because the District Court's determination was infected with an error of law. *Spawn II*, 989 F.2d at 840. The Fifth Circuit held that the District Court equated "arbitrary and capricious" and "not in accordance with law" *ipso facto* to "not substantially justified." *Id.* The Fifth Circuit did not discuss the weight or deference which the Court of Appeals should accord to the district judge holding an evidentiary hearing on EAJA attorney's fee, discussing with the FDIC the FDIC's justification for its position, finding that on the evidence the agency did not meet its burden of proof on "substantial justification", and the fact that the same district judge presided at the original merits hearing and at the subsequent EAJA trial on remand.

The First Circuit Court of Appeals, in considering this same fact pattern, held that the District Court did not abuse its discretion in awarding EAJA attorney's fees. *Sierra Club v. Secretary of Army,* 820 F.2d 513 (1st Cir. 1987).

> While it is true that the district court considered *Sierra I* in determining the reasonableness of the government's position, *i.e.,*the presence or absence of substantial justification, such consideration was by no means inconsistent with the duty of independent inquiry. After all, an analysis of the degree to which agency actions were or were not warranted cannot sensibly be made in a vacuum; prior proceedings in connection with this case must be taken into account. It

> would have been foolhardy-and wrong-for the district court, in calibrating the scales of substantial justification, to have pretended that our opinion in *Sierra I* did not exist, or to have ignored it.

Sierra Club, 820 F.2d at 518. "[W]e deem the court below to have meant that our decision in *Sierra I* preclude[d] a finding of substantial justification not because it was *our* decision, not because the government lost, not because the agency action ... was held to be arbitrary-but because the areas of weakness and inconsistency which *Sierra I* laid bare undermined the government's claim that waiver of an EIS had been substantially justified." *Sierra Club*, 820 F.2d at 518

The Fifth Circuit held that the District Court's original grant of summary judgment in favor of the FDIC's position is a factor weighing in favor of the FDIC in indicating that the District Court abused its discretion. *Spawn II*, 989 F.2d at 840. The First Circuit rejects this position. "To the extent that the defendants' district court victory deserved consideration, there is no reason to doubt that it was considered. The EAJA determination was made by the same district judge who had presided at the trial. It taxes credulity to ask us to believe that he overlooked his own earlier decision in analyzing the legitimacy of the government's position." *Sierra Club*, 820 F.2d at 519.

Impact on EAJA Litigation: Uncertainty in EAJA Litigation of Governmental Agency Positions.

EAJA litigants need to know their burden of proof on "substantial justification" in a case where governmental agency action has been reversed under the "arbitrary and capricious" or "not in accordance with the law" standard.

Prevailing parties cannot make a reasonable determination whether to pursue a separate EAJA suit without knowing the agency's and their own burden of proof. EAJA litigants need to know whether a "substantial justification" finding is made in the context of the previous ruling on the merits, as held by the First Circuit Court of Appeals, or in a vacuum.

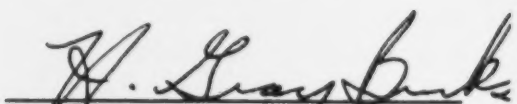
District Courts and Circuit Courts of Appeals need to know whether consideration of the "arbitrary and capricious" finding on the merits in the separate EAJA trial constitutes an abuse of discretion.

Under the current status of the case law, the standard of review, what constitutes the "record" for purposes of "substantial justification", and the burden of proof for EAJA trials on a governmental agency position which is reversed under the "arbitrary and capricious" standard is uncertain. Petitioner requests this Court to bring certainty into EAJA litigation of governmental agency positions.

CONCLUSION/PRAYER

For the foregoing reasons, Mr. Coy U. Spawn, Jr. respectfully requests this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the two issues presented to this Court in this Case.

Respectfully submitted,



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{APPENDIX A}

COY U. SPAWN, JR., Plaintiff - Appellee,

v.

WESTERN BANK - WESTHEIMER,
Defendant,

Federal Deposit Insurance Corporation,
Defendant - Appellant.
NO. 91-6200

United States Court of Appeals,
Fifth Circuit.

[May 4, 1993.]

Appeal from the United States District Court for the Southern District of Texas.

Before KING and EMILIO M. GARZA, Circuit Judges, and HALL,* District Judge.

KING, Circuit Judge:

The FDIC, in its corporate capacity as insurer of bank deposits, appeals from the district court's final judgment, which awarded Coy Spawn prejudgment interest and attorney's fees in connection with his claim for deposit insurance. As discussed below, we conclude (a) that the FDIC is immune from awards of prejudgment interest in the context of its decisions regarding deposit insurance, and (b) that the district court abused its discretion in determining that the FDIC's position was not substantially justified for purposes of the Equal Access to Justice Act. We therefore

*District Judge of the Eastern District of Texas, sitting by designation

reverse the district court's judgment to the extent it awarded Spawn prejudgment interest and reasonable attorney's fees.

I. BACKGROUND

On July 7, 1986, Coy Spawn and his sister, Bernadette Spawn, each deposited $100,000 in 91-day certificate of deposit accounts at Western Banks-Westheimer of Houston (Western Bank). The bank records for the first account, certificate of deposit number 55386 (COD 55386), revealed that (1) the DEPOSITOR was "Coy U. Spawn, Jr. or Bernadette A. Spawn," (2) LEGAL TITLE to the account was held by "Coy U. Spawn, Jr. or Bernadette A. Spawn," (3) only Coy Spawn's social security number was provided for TAX ID purposes, (4) both Coy Spawn and his sister Bernadette signed the signature card for the account, (5) the social security numbers of both Coy Spawn and his sister Bernadette appeared on the signature card, and (6) the account was denominated as being JOINT W/RIGHT OF SURVIVORSHIP. The bank records for the second account, certificate of deposit number 55387 (COD 55387), contain substantially similar information, except that (1) the names of Coy and Bernadette were in reverse order in records revealing who was DEPOSITOR and who held LEGAL TITLE to the account, and (2) only Bernadette Spawn's social security number was provided for TAX ID purposes.

Almost three months after the Spawn siblings had deposited their money in COD 55386 and COD 55387, the Texas State Banking Commissioner declared Western Bank insolvent and appointed the FDIC as receiver. The FDIC, in turn, approved the transfer of Western Bank's insured deposits to Charter National Bank-Houston. Thus, the FDIC, in its corporate capacity as insurer of bank deposits, began reviewing Western Bank's account records to

determine the amount of deposits that were federally insured.

After reviewing the bank records of COD 55386 and COD 55387, the FDIC determined that, under its regulations, the certificates of deposit were "jointly owned accounts" of Coy Spawn and his sister Bernadette. *See* 12 C.F.R. § 330.9 (1989) (pre-FIRREA).[1] The FDIC therefore aggregated the two accounts in calculating deposit insurance coverage. Because the funds in the two "jointly owned accounts" exceeded the statutory maximum of $100,000 for deposit insurance coverage, the FDIC determined that COD 55387 (the one listing Bernadette's social security number for TAX ID purposes) was insured up to $100,000, but that CD 55386 (the one listing only Coy's social security number for TAX ID purposes) was insured. The FDIC made no inquiry as to whether, despite the information contained in the bank records, the two certificates of deposit accounts were "in fact" separately owned.

On March 30, 1989, Coy Spawn (Spawn) filed a complaint in federal district court against the FDIC in its corporate capacity as insurer of bank deposits. Under the judicial review provisions of the Administrative Procedure act, Spawn sought a determination that COD 55386 was not an insured "jointly owned account," as previously determined by the FDIC, but rather a fully insured account owned solely by him. Spawn further sought prejudgment interest and attorney's fees.

The FDIC filed a motion for summary judgment, alleging that it was entitled to rely solely on bank records for purposes of determining whether COD 55386 was a

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[1]The parties agree that the pre-FIRREA versions of statutes and FDIC regulations apply to this case.

"jointly owned account" of Spawn and his sister under its regulations. The district court granted the motion. It concluded that the FDIC did not have to go "behind the failed bank's deposit records and ... make a factual determination as to the ownership interest in insured deposit account records." According to the district court, "in making the determination of ownership, the FDIC properly looked at the deposit records and signature cards which show that both Coy and Bernadette Spawn have a right to withdraw both accounts."

On appeal, this court reversed. *See Spawn v. Western Bank-Westheimer,* 925 F.2d 885 (5th Cir.1991) *(Spawn I).* Based on our review of the FDIC's regulations regarding "jointly owned account" determinations, we concluded that the FDIC had acted "arbitrarily and capriciously" in refusing to look behind the bank records to determine whether COD 55386 was in fact jointly owned by Coy and his sister Bernadette. We stated:

> [T]he FDIC's interpretation of the regulations at issue contradicts the unambiguously expressed directions they contain. we may not defer to that erroneous interpretation, which is not "in accordance with the law." 5 U.S.C. § 706(2)(A). Spawn must be permitted to prove that the certificate of deposit at issue, although styled as a joint tenancy with right of survivorship, was in fact an account separately owned by him and separately insurable by the FDIC. Because the facts necessary to Spawn's position were not proved or conceded, we must remand the case for further proceedings.

925 F.2d at 889.

On remand, the FDIC considered numerous records submitted by Spawn and, based on these records, determined that COD 55386 was "in fact" individually owned by Spawn. The only remaining issues, therefore, were whether Spawn was entitled to prejudgment interest, attorney's fees, and costs. After holding a trial on these issues, the district court concluded that (a) Spawn was entitled to recover prejudgment interest, and (b) because the FDIC's decision to deny insurance coverage was not "substantially justified," Spawn was entitled to recover attorney's fees under the Equal Access to Justice Act. The FDIC now appeals.[2]

II. ANALYSIS

A. The Prejudgment Interest Award

The FDIC first argues that the district court erred in awarding Spawn prejudgment interest. The FDIC specifically contends that, in its corporate capacity as insurer of deposit accounts, it is immune from awards of prejudgment interest for erroneous deposit insurance determinations. For the following reasons, we agree.

1. *The "No-Interest" Rule and Its Exceptions*

In *Library of Congress v. Shaw*, 478 U.S. 310, 311, 106 S.Ct. 2957, 2960, 92 L.Ed.2d 250 (1986), the Supreme Court reaffirmed the viability of the no interest rule, which

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[2]Spawn originally filed a cross-appeal, asserting that he was entitled to recover "market rate" attorney's fees-which may be awarded where a federal agency acts in bad faith, vexatiously, wantonly, or for oppressive reasons, *See Baker v. Bowen*, 839 F.2d 1075, 1081 (5th Cir.1988)-as opposed to "cap-rate" attorney's fees. On Spawn's own motion, however, this cross-appeal was dismissed.

provides "that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." The Court explained:

> In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. This requirement of a separate waiver reflects the historical view that interest is an element of damages separate from damages on the substantive claim.

Id. at 314, 106 S.Ct. at 2961. In holding that a separate, express waiver of immunity to interest is usually required, however, the Court in *Shaw* also noted that the "no interest rule is ... inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." *Id.* at 317 n. 5, 106 S.Ct. at 2963 n. 5 (citing *Standard Oil Co. of New Jersey v. United States,* 267 U.S. 76, 79, 45 S.Ct. 211, 212, 69 L.Ed. 519 (1925)).

We have read *Shaw* and subsequent cases to establish a general rule prohibiting an award of interest with at least two exceptions. as we stated in *McGhee v. Panama Canal Commission*, 872 F.2d 1213 (5th Cir. 1989):

> We begin with the general proposition that sovereign immunity bars an interest award against the United States. The rule admits of exceptions, two of which are relevant in this case. The United States may be ordered to pay interest [1] when Congress has expressly consented to such an award, ... and [2] when Congress has shed the cloak of sovereignty

> and given an agency the status of a commercial operation.

Id. at 1214-15. "The focus of the first exception," we explained, "is whether the legislation giving rise to the cause of action expressly subjects the government to interest payments." *Id.* at 1215. "The second exception," we continued, "turns on whether Congress, in creating the agency, intended a waiver of immunity from interest awards." *Id.* Thus, in *McGehee* we made it clear that Congress' intent to waive an agency's immunity from interest can be gleaned from either the stature creating the cause of action or the statute creating the agency. The ultimate question with regard to both of the exceptions, however, is whether Congress intended to waive the government's immunity from interest awards.

2. *Applying the "No-Interest Rule" and Its Exceptions in the Context of FDIC Deposit Insurance Determinations*

The FDIC argues that neither of the exceptions to the no interest rule applies to its deposit insurance determinations. The FDIC specifically contends that no provision of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811 et seq., expressly waives its immunity from interest awards. The FDIC further contends that, even though Congress gave the FDIC the power to "sue and be sued," Congress did not intend a broad waiver of the FDIC's immunity from interest. We address each of these contentions in turn.

a. *Express Waiver Exception*

In *Library of Congress v. Shaw,* which dealt specifically with the express waiver exception to the no

interest rule, an employee of the Library of Congress filed a suit against the agency under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. 478 U.S. at 312, 106 S.Ct. at 2960. The employee sought to enforce a settlement agreement awarding him a retroactive promotion with back pay. *Id.* The district court held that the settlement was valid under Title VII and accordingly authorized the agency (1) to promote the employee with back pay, and (2) to pay reasonable attorney's fees and costs. *Id.* at 312-13, 106 S.Ct. at 2960. In calculating the attorney's fees, the district court awarded interest "for the delay in receiving payment for the legal services rendered." Id. at 313, 106 S. Ct. at 2961. The court of appeals affirmed the interest award, on the basis of language in Title VII itself. *Id.* at 313-14, 106 S.Ct. at 2961.

The Supreme Court granted certiorari to "decide whether Congress, in enacting Title VII, expressly waived the Government's immunity from interest." *Id.* at 311, 106 S. Ct. at 2960.[3] The Court held that Congress had not. In so holding, the Court rejected the argument that Congress had expressly waived the Government's immunity from interest by making the United States liable "the same as a private person" for "costs," including "a reasonable attorney's fee," *see* 42 U.S.C. § 20003-5(k) (Section 706(k) of Title VII). *Shaw*, 478 U.S. at 317, 106 S.Ct. at 2963. The Court reasoned that: (a) by making the United States liable "the same as a private person," Congress had only waived the Government's immunity from attorney's fees and not from interest, *see* 478 U.S. at 318-320, 106 S.Ct. at 2963-64; (b) by allowing "reasonable" attorney's fees to be awarded against the United States, Congress did not intend to allow interest on those attorney's fees, *see id.* at 320-321, 106 S.Ct. at

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[3]It was undisputed that, in suits brought against private employers under Title VII, a prevailing employee might recover interest on attorney's fees. *See* 478 U.S. at 313, 106 S.Ct. at 2961.

2965; and (c) Congress did not intend prejudgment interest to be included as a component of the United States' liability for "costs," *see id.* at 321, 106 S.Ct. at 2965.

The express waiver standard set forth by the Supreme Court in *Shaw* is difficult to satisfy for plaintiffs seeking recovery of prejudgment interest. The Court in *Shaw* stated that, "[i]n analyzing whether Congress has waived the immunity of the United States, [courts] must construe waivers strictly in favor of the sovereign, ... and not enlarge the waiver beyond what the language requires." 478 U.S. at 318, 106 S.Ct. at 2963 (internal quotations and citations omitted). The Court further explained that "[t]he no-interest rule provides an added gloss of strictness upon these usual rules," and then set forth the following standard for judging whether a statutory provision expressly waives a federal agency's immunity from interest:

> There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Id. (internal quotations and citations omitted). Finally, the Court in *Shaw* cited examples of what would qualify as an express waiver of immunity from interest. One of the examples cited was 28 U.S.C. § 2411, which expressly authorizes awards of prejudgment and postjudgment interest against the United States in tax refund cases. *See Shaw,* 478 U.S. at 318 n. 6, 106 S.Ct. at 2964 n. 6.

Under the strict waiver standard of *Shaw*, the district court correctly concluded that Congress has not expressly waived the FDIC's immunity from interest awards. None of the provisions that Spawn relied on in the district court-including 12 U.S.C. §§ 1819(a),[4] 1821(f),[5] and 1822(b)[6]-expressly waives the FDIC's immunity from interest awards in the context of insurance determinations. Indeed, Spawn does not seriously argue on appeal that Congress expressly waived the FDIC's immunity from interest in the provisions of the Federal Deposit Insurance Act. Accordingly, we hold that Congress has not expressly waived the FDIC's immunity from prejudgment interest awards in the context of deposit insurance determinations.

b. *Commercial Enterprise Exception*

After determining that Congress had not expressly waived the FDIC's immunity from prejudgment interest awards, the district court proceeded to determine whether Congress had, in creating the FDIC, shed the agency's

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[4]12 U.S.C. § 1819(a) gives the FDIC, as insurer or receiver, the power "[t]o sue and be sued, and complain and defend, in any court of law or equity, State or Federal." Under *Shaw*, this provision would not constitute "express congressional consent to the award of interest *separate from* a general waiver of immunity to suit." 478 U.S. at 314, 106 S.Ct. at 2961.

[5]12 U.S.C. § 1821(f) prescribes how the FDIC should pay the insured deposits of a bank that has failed. It also provides for judicial review of FDIC insurance determinations. It does not, however, contain any language indicating that prejudgment interest may be awarded against the FDIC.

[6]12 U.S.C. § 1822 involves the FDIC *as receiver*. Therefore, it could not possibly provide an express basis for awarding prejudgment interest against the FDIC as insurer.

"cloak of sovereignty" and given it the status of a commercial enterprise. Focusing on language in 12 U.S.C. § 1819(a), which allows the FDIC "to sue and be sued," the district court concluded that Congress intended to waive the FDIC's immunity from interest in the context of erroneous insurance determinations. The district court reasoned: "When Congress establishes an agency and authorizes it to engage in commercial business activities and permits it to sue and be sued, the presumption is that Congress did intend prejudgment interest."

In holding that the FDIC's sue-and-be-sued clause permits recovery of prejudgment interest, the district court primarily relied on the Supreme Court's decision in *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed. 2d 549 (1988). The question presented in *Loeffler* was identical to the question addressed by the Court in *Shaw*, except that a different federal agency was involved. Specifically, in *Loeffler* the Court granted certiorari to determine "whether prejudgment interest may be awarded in a suit *against the United States Postal Service* brought under Title VII of the Civil Rights Act of 2964." 486 U.S. at 551, 108 S.Ct. 15 1967 (emphasis added). The Court determined that, despite the general no interest rule, such interest could be awarded against the Postal Service.

The Court in *Loeffler* first focused on the significance of a sue-and-be-sued clause in an agency's enabling legislation. It began with the general immunity rule, by noting that "[a]bsent a waiver of sovereign immunity, the Federal Government is immune from suit." 486 U.S. at 554, 108 S.Ct. at 1969. The Court then observed, however, that "Congress ... has waived the sovereign immunity of certain federal entities from the time of their inception by including in the enabling legislation provisions that they may sue and be sued." *Id.* When Congress allows federal agencies "to

sue and be sued," the Court continued, a liberal construction rule should be applied to determine the extent of the waiver. It stated:

> [S]uch waivers ... of governmental immunity ... should be liberally construed....Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Id. (quoting *FHA V. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724(1940)). Under this liberal construction rule, the Court recognized "that authorization of suits against federal entities engaged in commercial activities may amount to a waiver of sovereign immunity from awards of

interest when such awards are an incident of suit." 486 U.S. at 555, 108 S.Ct. at 1969.

The Court in *Loeffler* then focused on the nature of the Postal Service. It stated: "When Congress created the Postal Service in 1970, it empowered the Service 'to sue and be sued in its official name.' 39 U.S.C. § 401(1). This sue-and-be-sued clause was part of Congress' general design that the Postal Service 'be run more like a business than had its predecessor, the Post Office Department.'" 486 U.S. at 556, 108 S.Ct. at 1969 (quoting *Franchise Tax Board of California v. USPS*, 467 U.S. 512, 520, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984)). Focusing on the nature of the Postal Service, the Court in *Loeffler* stated:

> By launching the Postal Service into the commercial world, and including a sue-and-be-sued clause in its charger, Congress has cast off the Service's cloak of sovereignty and given it the status of a private commercial enterprise. It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards.

486 U.S. at 556, 108 S.Ct. at 1969 (internal quotations and citations omitted). And, because the presumption of waiver was not overcome by any of the exceptions to the liberal construction rule, the Court concluded that, "at the Postal Service's inception, Congress waived its immunity from interest awards, authorizing recovery of interest from the Postal Service to the extent that interest is recoverable against a private party as a norman incident of suit." *Id.* at 557, 108 S.Ct. at 1970.

The Court in *Loeffler* finally turned to the question of whether prejudgment interest would be recoverable against a private party in a suit brought under Title VII. All parties agreed that Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers. *Id.* at 557-58, 108 S.Ct. at 1970-71. Accordingly, the Court held that the Postal Service could be subjected to an interest award in a Title VII case.

In our view, the district court read *Loeffler* to broadly when it concluded that the FDIC is subject to prejudgment interest for erroneous deposit insurance determinations. It placed great, if not dispositive, weight on the fact that Congress has authorized the FDIC to "sue and be sued." It also concluded-without much discussion-that the FDIC is engaged in a "commercial enterprise" in making deposit insurance determinations. Further, the district court did not consider whether allowing prejudgment interest in this case would conflict with the provisions of the Federal Deposit Insurance Act, or whether prejudgment interest would be recoverable against a private party under like circumstances.

This court has twice suggested that the presence or absence of a sue-and-be-sued clause is not dispositive of the question whether a federal agency is subject to a prejudgment interest award. In *R & R Farm Enterprises v. Federal Crop Ins. Corp.*, 788 F.2d 1148 (5th Cir.1986), a case that was decided before *Loeffler*, we explained:

> To state that the "sue and be sued" provision in the Federal Crop Insurance Act ... waives the FCIC's sovereign immunity does not ... fully resolve the issue [of whether prejudgment interest may be awarded against it for making an erroneous insurance

> determination]. It is also necessary to determine the scope of that waiver.

Id. at 1152. The crucial question with respect to awards of prejudgment interest, we noted, is whether the sue-and-be-sued agency "has embarked upon an essentially commercial venture which aspires to profitability." *Id.* at 1153. More recently, in *McGehee v. Panama Canal Commission*, we again indicated that the presence of a sue-and-be-sued clause may not be talismanic for purposes of determining whether a federal agency is subject to prejudgment interest awards.[7] 782 F.2d at 1218; *see also Sandia Oil Co. v. Beckton*, 889 F.2d 258, 262 (10th Cir. 1989) (absence of a general sue-and-be-sued clause not necessarily fatal to claim that agency is subject to prejudgment interest awards under *Loeffler*); *Far West Federal Bank*, 787 F.Supp. 952, 962 (D.Or.1992) (holding that FDIC's sue-and-be-sued clause did not dispose of question whether FDIC could be held liable for prejudgment interest). We did emphasize in *McGehee*, however, that or the *Loeffler* exception to apply, the federal agency must be operating as "a commercial venture. 872 F.2d at 1218.

The district court concluded that Congress, by authorizing the FDIC to provide "insurance," has launched the FDIC in the commercial world and removed its "cloak of sovereignty." We disagree. The FDIC, when it is acting in its capacity as an insurer of deposits, is not like the Postal

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[7] In *McGehee*, the plaintiffs were arguing that the Panama Canal Commission-which Congress has not authorized "to sue and be sued" - was nonetheless subject to prejudgment interest awards for property damage. This court assumed *arguendo* that a sue-and-be-sued clause is not essential, but nonetheless determined that the Panama Canal Commission was not engaged in a commercial venture. *See* 872 F.2d at 1218-19.

Service in *Loeffler*,[8] but more like the Federal Crop Insurance Corporation in *R&R Farm Enterprises.*

The Federal Deposit Insurance Act, like the Federal crop Insurance Act, represented a "pioneering effort" to insure losses in a market "where commercial insurers had feared to tread." *See R & R Farm Enterprises*, 788 F.2d at 1153. as the Supreme Court recently stated:

> Congress' purpose in creating the FDIC was clear. Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings.... To prevent bank failure that resulted in the tangible loss of hard assets was therefore the focus of Congress' effort in creating deposit insurance.

FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 432-33, 106 S.Ct. 1931, 1935, 90 L.Ed.2d 428 (1986); *see also United States v. Doherty*, 18 F.Supp. 793, 794 (D.Neb.1937) (noting that the FDIC "is an instrumentality created by the government for the public welfare..." to provide for the

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[8]The FDIC's role as insurer of deposits is also distinguishable from the government's role in *Standard Oil Co. of New Jersey v. United States*, 267 U.S. 76, 45 S.Ct. 211, 69 L.Ed. 519 (1925), a case in which the Court awarded prejudgment interest to claimants under two policies of insurance issued by the government protecting the steamship Llama and her freight against war risks. *Standard Oil*, we have stated, stands for the proposition that an award of interest will be permitted "where the government under[takes] a commercial [insurance] enterprise and, because [the government] ma[kes] a profit, where such an award would not impose liability on the United States Treasure." *See R & R Farm Enterprises, 788 F.2d at 1152.*

sound, effective, and uninterrupted operation of the banking system and for other purposes), *aff'd,* 94 F.2d 495 (8th Cir. 1938), *cert. denied,* 303 U.S. 658, 58 S.Ct. 763, 82 L.Ed. 1117 (1938). More importantly, the FDIC notes, "[t]here is no private, commercial equivalent to the FDIC's role of stabilizing and promoting confidence in the national banking system." In addition, although the FDIC relies on premiums for insured banks to pay the cost of deposit insurance, *see* 12 U.S.C. § 1817, The FDIC also relies on borrowing from the United States Treasury to meet its obligations, *see* 12 U.S.C. § 1824. Thus, we conclude that the FDIC does not constitute a commercial enterprise within the meaning of *Loeffler. See also Sandia Oil Co. v. Beckton,* 889 F.2d at 263 holding that Federal Emergency Management Agency's flood insurance program is not a commercial venture).

The district court also ignored an important distinction between this case and *Loeffler*-namely, that the plaintiff in *Loeffler* filed suit against the Postal Service under Title VII, a statute that clearly authorizes the award of prejudgment interest against private employers. In this case, by contrast, no underlying statute clearly authorizes an award of prejudgment interest. As discussed above, Spawn brought suit under the judicial review provisions of the Administrative Procedure Act (APA) to challenge the FDIC's insurance determination under the Federal Deposit Insurance Act. Spawn does not even argue that the judicial review provisions of the APA permit federal courts to award prejudgment interest against agencies for wrongful conduct.[9] And, as the Tenth Circuit pointed out in

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[9]We note that several courts have held that the APA does not authorize federal courts to award any kind of monetary damages against an agency. *See Williams v Casey,* 657 F.Supp. 921, 926 (S.D.N.Y. 1987) (holding that monetary damages are not authorized by the APA); *Fidelity Financial Corp. v. Federal Home Loan Bank,* 589 F.Supp. 885, 895

rejecting a similar claim for prejudgment interest against the FDIC, the Federal Deposit Insurance Act expressly "permits delays in paying insurance when the FDIC is in doubt about the validity of a claim to insurance proceeds."[10] *Philadelphia Gear v. Corp. v. Federal Deposit Ins. Corp.*, 751 F.2d 1131, 1138-39 (10th Cir.1984, *rev'd on other grounds*, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986); *see also Marchese v. United States,* 781 F.Supp. 241, 246 (S.D.N.Y.1991) (relying on *Philadelphia Gear* to hold that plaintiffs could not recover prejudgment interest for FDIC's wrongful withholding of their certificates of deposit). The underlying statutes governing Spawn's claim against the FDIC, therefore, unlike Title VII, argue against allowing prejudgment interest awards against the FDIC in cases like this.

In sum, although there is support for the proposition that the FDIC is subject to prejudgment interest awards when it makes an erroneous deposit insurance determination,[11] we conclude that the district court erred

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(N.D.Cal.1983) ("[T]he APA does not confer upon federal courts the authority to assess and levy monetary relief ex post to compensate those injured by tortious agency action.").

[10]12 U.S.C. § 1821(f) provides, in pertinent part:

> [T]he Corporation, in its discretion, may require proof of claims to be filed before paying the insured deposits, and ... in any case where the Corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination of a court of competent jurisdiction before paying such claim.

[11]*See, e.g., North New York Savings Bank v. FSLIC,* 515 F.2d 1355, 1364 (D.C.Cir.1975)(concluding that FSLIC was subject to prejudgment interest awards, because Congress enabled it to sue and be sued and placed the FSLIC "in the insurance business"); *Texas American Bankshares, Inc. v. Clarke,* 740 F.Supp. 1243, 1248-49 (N.D.Tex.1990)

in awarding prejudgment interest under the "commercial enterprise" exception to the no interest rule. The FDIC's sue-and-be-sued clause, although constituting a broad waiver of the agency's immunity from suit, does not dispose of the questions whether Spawn may recover interest. The more important considerations are whether the FDIC as insurer of deposits is engaging in commercial operation and, ultimately whether Congress intended the FDIC to be liable for prejudgment interest in the context of erroneous deposit insurance determinations. In our view, the FDIC is not engaged in a commercial enterprise when it acts as insurer of deposits, but rather as a protector of the banking system and the general welfare. More importantly, Congress specifically contemplated delays in FDIC insurance determinations-without specifically providing for awards of prejudgment interest. Thus, following the Tenth Circuit in *Philadelphia Gear,* we hold that the FDIC is immune from prejudgment interest awards in the context of erroneous deposit insurance determinations.[12]

B. The Attorney's Fee Award

The FDIC also argues that the district court erred in awarding Spawn attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Specifically, the FDIC

(concluding that FDIC is not entitled to claim sovereign immunity because it was created with sue-and-be-sued clause and relies on premiums from banks), *rev'd on other grounds*, 954 F.2d 329 (5th Cir.1992).

[12]We express no opinion regarding whether the FDIC, when acting in other capacities and other contexts, is immune from prejudgment interest awards. *See, e.g., Northern Bank v. Federal Deposit Ins. Corp.*, 242 Neb. 591, 496 N.W.2d 459 (1993) (holding that FDIC in its capacity as receiver is not entitled to claim immunity from prejudgment interest awards).

contends that the district court abused its discretion in finding that the FDIC's position-i.e., its reliance on the Spawns' deposit account records to determine the ownership of their certificates of deposits-was not substantially justified. For the following reasons, we agree and, accordingly, reverse the district court's award of attorney's fees.

1. *Attorney's Fees Under the Equal Access to Justice Act*

The Equal Access to Justice Act directs courts to award "to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The Act further instructs:

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

Id. § 2412(d)(1)(B). Finally, the Act defines the "position of the United States" as meaning, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." *Id.* § 2412(d)(2)(D).

In *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), the Supreme Court defined the phrase "substantially justified" in 12 U.S.C. § 2412(d)(1)(A).

It explained that the government's position, to be "substantially justified," need not be "'justified to high degree,' but rather 'justified to a degree that could satisfy a reasonable person." 487 U.S. at 564, 108 S.Ct. at 2549. Although the Court cautioned that, to be substantially justified, a position must be "more than merely undeserving of sanctions for frivolousness," *id.* at 566, 108 S.Ct. at 2551, the Court refused to require the government to demonstrate that its position was "more than merely reasonable." *See id.* at 566-67, 108 S.Ct. at 2551. Ultimately, the Court equated a "substantially justified" position with one having a "reasonable basis both in law and fact." *Id.*

The Court in *Pierce* also resolved questions about the appropriate standard of appellate review with regard to a district court's characterization of the government's position. It held that a district court's determination of whether the government's position has been "substantially justified: should be reviewed under the abuse of discretion standard. *See id.* at 562-63, 108 S.Ct. at 2549. In so holding, the Court reasoned: "We think that the question whether the [g]overnment's litigating position has been 'substantially justified' is ... a multifarious and novel question, little susceptible for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Id.* at 562, 108 S.Ct. at 2548.

Thus, we review a district court's determination that the government's position was (or was not) substantially justified for abuse of discretion. *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 416 (5th Cir.1992); *Perales v. Casillas*, 950 F.2d 1066, 1072 (5th Cir.1992). Underlying findings of fact, of course, are reviewed for clear error. *Aguilar-Ayala*, 973 F.2d at 416; *Perales*, 950 F.2d at 1073. Underlying conclusions of law, however, are reviewed de novo. *Aguilar-Ayala*, 973

F.2d at 416; *Perales*, 950 F.2d at 1072-73. As Judge Friendly has stated, "[i]t is not inconsistent with the discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law." *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir.1983).

2. *The District Court's Award of Attorney's Fees*

The district court in this case found that the FDIC's position in refusing to look behind the bank records of COD 55386 to determine ownership was not substantially justified. In so finding, the district court relied exclusively on this court's holding in *Spawn I*. It stated:

> FDIC has not established that its position was substantially justified. The Fifth Circuit found that FDIC's decision to deny insurance coverage on Mr. Spawn's certificate of deposit was arbitrary and capricious or otherwise not in accordance with law. The Fifth Circuit further found that FDIC's interpretation of the regulation contradicted the unambiguously express directions that they contained. That is the reason for my finding. My finding is not based upon the inconclusive communications back and forth between Mr. Spawn and Ms. Martin concerning the format of the proof of claim. I don't find that there's any evidence to be gleaned from the documents or oral communications that bears upon substantial justification or that bears on bad faith.

Thus, the district court essentially found that, because the FDIC's position with respect to determining ownership of COD 55386 was held to be "arbitrary and capricious" and

"not in accordance with law," it was *ipso facto* not substantially justified.

We think that the district court, in determining that the FDIC's position was not substantially justified, misapprehended the governing legal standards. It appears that the district court ignored section 2412(d)(1)(B), which instructs courts to make the substantial justification determination "on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based)." The district court did not consider the entire litigation posture of the FDIC, but conclude that, because the FDIC was unsuccessful in *Spawn I*, it position was not substantially justified. On this score we agree with the First Circuit, that district courts should "refrain from treating every reversal of agency action as the functional equivalent of an 'unreasonable position'" under the Equal Access to Justice Act. *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir.1987; *see also Pierce*, 487 U.S. at 569, 108 S.Ct. at 2552 ("Conceivably, the [g]overnment could take a position that is not substantially justified, yet win; *even more likely, it could take a position that is substantially justified, yet lose.*")(emphasis added); *Evans v. Sullivan*, 928 F.2d 109, 110 (4th Cir.1991)("it would be a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified.). As we stated in *Griffon v. United States Department of Health & Human Services*, 832 F.2d 51, 52 (5th Cir.1987), [m]erely because the government's underlying action was held legally invalid as being 'arbitrary and capricious' does not necessarily mean that the government acted without substantial justification...."

Moreover, after reviewing the record and our decision in *Spawn I*, we are convinced that, under the

governing legal standards, the FDIC was substantially justified in relying on the Spawns' deposit account records to determine ownership of their certificates of deposit. After all, even the district court originally found the FDIC's position meritorious enough to warrant granting summary judgment in its favor. This fact alone, of course, does not render the FDIC's position substantially justified, *see Estate of Smith v. O'Halloran*, 930 F.2d 1496, 1501 10th Cir. 1991), but it is a factor weighing in favor of the FDIC. More importantly, in our view, is the confusing nature of 12 C.F.R. § 330.9 (1992)-the particular regulation involved in this case. *See Palermo v. Federal Deposit Ins. Corp., vs. Corp.,* 981 F.2d 843, 846 (5th Cir.1993) (noting that new version of regulation, like the older version, is inartfully drafted, internally inconsistent, ambiguous, and irreconcilable). Our decision in *Spawn I*, that the FDIC had to determine whether COD 55386 was in fact jointly owned, rested not on the unreasonableness of the FDIC's position, but rather on a need to make sense out of a confusing regulation. We noted that the first sentence of section 330.9(b) was entirely consistent with the FDIC's position. *See* 925 F.2d at 888. The FDIC's position failed, however, under the second sentence of section 330.9(b), which in a back-handed fashion (and in a way apparently not envisioned by the FDIC) established a different test for determining whether certificates of deposit were jointly owned. *See id.*

Accordingly, we hold that the district court abused its discretion in concluding that the FDIC's litigating position was not substantially justified. The district court's determination, it appears, was "infected with an error of law. Moreover, we are convinced that, although the FDIC's litigating position ultimately proved unsuccessful, it was justified in substance or in the main, to the degree that it

could satisfy a reasonable person. *See Pierce*, 487 U.S. at 564, 108 S.Ct. at 2549.

III. CONCLUSION

The district court erred in awarding Coy Spawn prejudgment interest and attorney's fees. Contrary to the district court's conclusion, the FDIC is immune from prejudgment interest awards in the context of erroneous deposit insurance determinations. And with respect to the attorney's fee award, the district court abused its discretion in determining that the FDIC's position was not substantially justified.

The part of the district court's final judgment awarding Spawn prejudgment interest and attorney's fees is, therefore, REVERSED. In all other respects, the judgment is AFFIRMED. Each party shall bear its own costs.

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All right. Pursuant to Federal Rule of Civil Procedure 52, I make the following findings of fact and conclusions of law:

Conclusion of Law No. 1: The Equal Access to Justice Act requires the Government to show that its position was substantially justified. Substantially justified does not mean justified to a high degree. It means justified in substance or in the main; that is, justified to a degree that would satisfy a reasonable person, Pierce versus Underwood, 108 Supreme Court 2541 (1988). It means more, however, than merely not deserving sanctions for frivolousness.

Conclusion of Law No. 2: Whether the position of the Government is substantially justified shall be determined

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on the basis of the record with respect to the action or failure to act by the agency upon which the lawsuit is based,

28 United States Code, Section 2412(d)(1)(B) and (d)(2)(D).

Finding of Fact No. 1: FDIC has not established that its position was substantially justified. The Fifth Circuit found that FDIC's decision to deny insurance coverage on Mr. Spawn's certificate of deposit was arbitrary and capricious or otherwise not in accordance with law. The Fifth Circuit further found that FDIC's interpretation of the regulation contradicted the unambiguously express directions that they contained. That is the reason for my finding. My finding is not based upon the inconclusive communications back and forth between Mr. Spawn and Ms. Martin concerning the format of the proof of claim. I don't find that there's any evidence to be gleaned from the documents or oral communications that bears upon substantial justification or that bears on bad faith.

Finding of Fact No. 2: Because I conclude that FDIC did not act in bad faith, vexatiously, wantonly, or for

oppressive reasons, plaintiff's are not entitled under the Equal Access to Justice Act to recover market rate attorney's fees.

Conclusion of Law No. 3: The failure of the plaintiff to file an application with the Court within 30 days after a final judgment as prescribed in 12 U.S.C., Section

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2412(d)(1)(A) does not bar the award of the attorney's fees requested by the plaintiff. The Court in managing its own docket can make this determination before entry of judgment if to do so would be as in this case a more efficient use of the Court and the parties' time and so that all issues can be incorporated in one final judgment subject to appeal as opposed to piecemeal appeals from a final judgment and a subsequent attorney's fee award.

Finding of Fact No. 4: Mr. Spawn is a party as defined by 28 U.S.C., Section 2412(d)(2)(B) because his net worth did not exceed $2 million when this action was filed.

Finding of Fact No. 5: Mr. Spawn is a prevailing party as defined by 28 U.S.C., Section 2412(b) and (d)(1)(A).

Conclusion of Law No. 3: Mr. Spawn is entitled to recover costs as enumerated in 28 United States Code, Section 1920, pursuant to 28 United States Code, Section 2412(a).

Finding of Fact No. 6: The reasonable attorney's fees to be awarded to Mr. Spawn are $43,834.99 plus reasonable costs and expenses of $4,215.47. The only amount of costs I'm excluding are the amounts shown on Plaintiff's Exhibit D as Mr. Spawn's out-of-pocket expenses, which plaintiff has presented no authority are recoverable since he was then appearing pro se. To the extent that any of the costs awarded relate to what would otherwise be taxable costs under 28

U.S.C., Section 1920, the plaintiff is not to seek those costs in the tax bill because that would result in a double recovery.

MR. BURKS: Is not to seek them?

THE COURT: You can't get them both. If you're going to get them from them and under my judgment, you're not going to later file a tax bill seeking recovery of the same costs from them.

MR. BURKS: Oh, right. I understand, Your Honor.

THE COURT: Finding of Fact No. 7: The attorney hourly rate fee cap mandated by 28 United States Code, Section 2412(d) is $75 plus a cost of living increase of $33.56 resulting in a total hourly rate of $108.56.

Do you have the interest calculation?

MR. DEGRASSE: Yes, I do, Your Honor.

MR. BURKS: Your Honor, this is the only copy. I think copies are in order after we recess.

THE COURT: All right. Well, when I'm through, I'm going to have you prepare a final judgment and give it to the FDIC for review.

MR. BURKS: Yes, Your Honor.

THE COURT: You can make them a copy of Exhibit B and if they want to calculate it, I'm sure they've got accountants and if they find the figure as calculated -- as everybody knows how it was calculated. If they find it's wrong, they can get

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back with you and you can submit the correct figure in the judgment.

MR. BURKS: Yes, your Honor.

THE COURT: Conclusion of Law No. 4: 12 United States Code, Section 1822(b) does not provide an express waiver of sovereign immunity for the payment of interest to the plaintiff. It involves the FDIC as receiver, not in its corporate capacity and under the standard articulated in

Library of Congress versus Shaw, 106 Supreme Court 2957, is not an express -- is not any waiver much less an express waiver of immunity for interest claims.

Conclusion of Law No. 5: 12 United States Code, Section 1821(f) does not provide an express waiver of sovereign immunity for the payment of interest to the plaintiff.

Conclusion of Law No. 6: 12 United States Code, Section 1819(a) Fourth does not provide an express waiver of sovereign immunity for the payment of interest under the Library of Congress versus Shaw analysis and under the Tenth Circuit's opinion in Philadelphia Gear Corporation versus FDIC, 751 Federal 2d 1131.

Conclusion of Law No. 7: However, in addition to the express waiver test, which was dealt with in Library of Congress versus shaw and Philadelphia Gear Corp. versus FDIC in which a waiver of sovereign immunity

is strictly construed in favor of the United States, the Supreme Court has also adopted

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another exception to sovereign immunity which looks at the issue of whether Congress in creating an agency intended a waiver of immunity from interest awards. See McGehee versus Panama Canal Commission, 872 Federal 2d 1213 at 1214-15, Fifth Circuit 1989.

When Congress establishes an agency and authorizes it to engage in commercial business activities and permits it to sue and be sued, the presumption is that Congress did intend prejudgment interest, Loeffler versus Frank, 108 Supreme Court 1965 at 1969. Quoting from that page of the opinion, the Supreme Court says, in quoting from a prior case, FHA versus Burr, 60 Supreme Court 488, "If the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the

statutory and constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such a showing, it must be presumed that when Congress launched a governmental agency into the commercial world or endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

In this case 12 United States Code, Section

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19(a) Fourth says, quote, "upon June 16th, 1933, the corporation shall become a body corporate and as such shall have power to sue and be sued, and complain and defend, in any court of law or equity, State or Federal.

I have reviewed the legislative history of this statute, as scant as it is, and the legislative history to Section 19(a)Fourth does not indicate that Congress intended that the "sue and be sued" language there was intended to have a less expansive meaning than the examples cited by the Supreme Court in Loeffler. The fact that the FDIC Corporation also engages in governmental functions, as it points out in its recent brief, is not dispositive. The post office and the other entities cited by the Supreme Court also have a governmental function. They also issue regulations. Violating postal regulations is a felony, for example. In fact, its a Federal crime to tamper with or cut a mailbag. Here, however, the FDIC was engaging in the business of insurance. It was not engaging in any governmental activity and I find that under the Loeffler test there is not an exception to the "sue and be sued" clause that would preclude the general waiver of sovereign immunity for FDIC corporate in the business of insuring

institutions. Although there are two cases -- there are a number of cases cited by the parties, there are two cases that appear to support this interpretation: North New York Savings Bank versus FSLIC, 515 Federal 2d 1355 at 1364, D.C.

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Circuit 1975 and Texas American Bancshares, Inc., versus Clarke, 740 Federal Supplement 1243 at 1248 and 1249, a Northern District of Texas case from 1990.

Conclusion of Law No. 8: The 6 percent compounded daily rate sought by the plaintiff is not supportable in Texas law. The only rate supportable in this type of action under Texas law would be a 6 percent compounded annually; that is, 6 percent simple, under Article 5069-1.03, according to the Supreme Court of Texas opinion in Perry Roofing versus Olcott and several Fifth Circuit opinions construing that statute. However, as the plaintiff points out, the Court is also entitled to award

interest as damages for the forbearance of the money to the plaintiff. I find that the alternative calculation by Mr. DeGrasse based on Exhibit A, using the rates that the IRS would pay for overpayments, is fair compensation to the plaintiff for the loss of use of his money. That's Finding of Fact 8.

And I find that the plaintiff is entitled to recover the $39,061.07 in prejudgment interest in this case.

Does either party desire any supplemental findings of fact or conclusions of law?

All right. Any conclusion of law which is more properly characterized as a finding of fact is adopted as such and vice versa.

Plaintiff will prepare a proposed final judgment.

{APPENDIX C}

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6200

COY U. SPAWN, Jr.,

Plaintiff-Appellee,

versus

WESTERN BANK - WESTHEIMER,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(June 21, 1993)

Before KING and EMILIO M. GARZA, Circuit Judges, and Hall,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____/S/_____
United States Circuit Judge

*District Judge of the Eastern District of Texas, sitting by designation.

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THE COURT: All right. Both parties rest.

I have a couple of questions. I have read all the briefs and let me say that both counsel prepared very thorough briefs on this issue. I want to address a couple of questions.

On the attorney's fee question, the FDIC argues in its memorandum, page 7, that the plaintiff never argued before this Court or the Fifth Circuit the regulation on which the Fifth Circuit relied. I take it that the FDIC in its brief

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is referring to 330.9(B)?

MS. BERKLEY: That's correct, Your Honor.

THE COURT: All right. Did you ever -- I don't remember that you raised that before me because quite candidly I told you at the time I was looking for some basis

to rule for you and couldn't find one. Did you cite that to me or to the Fifth Circuit?

MR. BURKS: Your Honor, the Fifth Circuit opinion, starting first with the Fifth Circuit and then you, the Fifth Circuit opinion is a mirror of the argument developed most succinctly in the second -- their reply brief of the appellate. I think you will find an extensive section on that in the reply brief for the Fifth Circuit.

THE COURT: Well, I don't get briefs from the Fifth Circuit.

Do you have those briefs?

MS. BERKLEY: I don't have the briefs with me, Your Honor, but I recall the entire provision of that regulation being cited but no particular argument about the sentence that the Fifth Circuit stated.

MR. BURKS: I don't know what to tell you except that that's my argument in the opinion, Your Honor.

MS. BERKLEY: I'll be happy to provide copies of that rehearing and whatever else that you may need to assist that.

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THE COURT: All right.

MR. BURKS: Your Honor, on my original complaint which I filed, starting on page 8, you talk about defining ownership by state law.

THE COURT: I've got it.

MR. BURKS: In Paragraph 26, I may be missing something, but it sure seems to me that's what I'm doing there in paragraph 26.

THE COURT: Well, did you ever argue the particular sentence that the Fifth Circuit pointed out; that is, the sentence, quote, "But such a deposit must, in fact, be jointly owned to create a distinction as between certificates of deposits and other types of accounts?"

MR. BURKS: That's my argument in the Fifth Circuit, Your Honor. I know that the counsel here were not present for the oral argument and weren't the ones arguing it.

THE COURT: Well, I don't know whether you did or not then. I'll just have to not consider that point.

If the FDIC thought this position was substantially justified, did it ask the Fifth Circuit for a rehearing on the issue or a rehearing en banc?

MS. BERKLEY: I don't believe it did, Your Honor.

THE COURT: Why not?

MS. BERKLEY: Well, at that time, consider what the Fifth Circuit -- I didn't represent the FDIC in the Fifth

Circuit. So, I can't tell you all the reasons behind why they didn't.

THE COURT: Who represented them?

MS. BERKLEY: A gentleman in the appellate section of the FDIC in Washington.

THE COURT: All right. Have we got the revised Exhibit B yet?

MR. DEGRASSE: Almost there, Your Honor.

THE COURT: All right. Let me know when you've got it.

It's the burden of proof of the Government to show under the Equal Access to Justice Act that its position was substantially justified. And as I read Pierce versus Underwood, that means justified in substance or in the main; that is, to a degree that would satisfy a reasonable person.

The Fifth Circuit didn't have any opinion finding that the FDIC's interpretation was an abuse of discretion, which indicates to me perhaps a reasonable person wouldn't have reached that decision.

How does the FDIC justify its interpretation of 330.9(B) as being controlled by 330.1(B)1?

MS. BERKLEY: Your Honor, the FDIC, because of the volume of accounts it has to consider, feels most comfortable in viewing those documents -- or those accounts based on the

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records that it has presented to it when a bank fails.

I think the fact that other attorneys in this city who Mr. Spawn contacted felt as the FDIC did, that there was little basis in the claim is one.

THE COURT: I don;t think he said that. I think he said he couldn't find anybody who would sue them, which I find incredible to believe because I must have 100 suits on my docket with people suing them, but anyway.

MS. BERKLEY: But I believe the FDIC has found a great deal of comfort in looking at the signature cards and the records of the bank and making a determination about

deposit insurance. And generally individuals who have that level of an account, an account worth $100,000, would make sure that the signature card reflects that they intend for it to reflect. This particular signature card was checked "joint" and it was made out for Coy U. Spawn or his sister Bernadette Spawn. I think anyone looking at that account could properly conclude that that was a joint account.

Now, the Fifth Circuit even though it had no problem in finding that when the FDIC made its decision, it didn't do so properly, it also made the comment that this was in a very unusual circumstance.

THE COURT: All right. I've read your brief and let me say you persuasively make the case as to the need to move expeditiously when a bank closes so that other depositors can

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get their money and the other policy reasons. What concerns me is not with the policy reasons but the language

of 330.9(B), which indicates that the agency when it drafted the regulation intentionally drew a distinction between time certificates of deposit and other types of accounts. It says that notwithstanding the fact that they both possessed withdrawal rights under the account records and had joint signature cards, that the regulation in question says that these restrictions, quote, "shall not apply to co-owners of a time certificate of a deposit but such a deposit must, in fact, be joir' , owned."

MS. BERKLEY: Well, I believe in that situation I can -- I'm really just speculating for the present time. I can look at the records for that and the section, but the assumption most likely was that in many instances time certificate of deposits did not have signature cards or records to reflect the ownership of the account.

I believe earlier Mr. Turner when he was questioning Ms. Martin referred to the new regulations, which make the distinction but based upon time certificate

of deposits that do not have signature cards. To the extent that there was a mistake or a problem with the initial reg, that was corrected and the understanding continues as it was.

THE COURT: Well, I'm not talking about the current regulation. I'm talking about what a reasonable

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regulator or a regulatory official would have read the phrase "but such a deposit must, in fact, be jointly owned" to mean. Now, I realize I made the same mistake, but I've already been reversed for my mistake. So, I'm asking you what could that sentence mean but what the plaintiff contends? In other words, that it refers to in fact. In other words, you must look at the underlying circumstances like Mr. Spawn wanted you to.

MS. BERKLEY: Yes. But I believe what occurred in the way the agency interpreted that regulation was that its

belief was that many time certificates of deposits did not have signature cards.

THE COURT: But this one did.

MS. BERKLEY: This one did. So, therefore there was a record for anyone reviewing that account to look at to determine the ownership. Now, that still may exist but the reg takes care of it and says that if there is no signature card, then ownership must be determined in fact. However, even for time certificates of deposits and other negotiable instruments, if there is a signature card there, that's what the agency will look to -- and base it's determination on those particular records.

(2)

No. 93-471

Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

COY U. SPAWN, JR., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation is immune from prejudgment interest when it makes an erroneous deposit insurance determination.

2. Whether the district court applied the wrong standard in determining that petitioner was entitled to attorney fees under the Equal Access to Justice Act because the government's position was not "substantially justified."

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In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 93-471

COY U. SPAWN, JR., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 989 F.2d 830. The decision of the district court (Pet. App. B1-B12) is unreported. The opinion of the court of appeals at the merits stage of the litigation is reported at 925 F.2d 885.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1993. A petition for rehearing was denied on June 21, 1993. Pet. App. C1-C2. The petition for a writ of certiorari was filed on September 20, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 7, 1986, petitioner Coy U. Spawn, Jr., and his sister, Bernadette A. Spawn, opened two certificate of deposit accounts at Western Bank-Westheimer, each in the amount of $100,000. Each certificate of deposit, and the signature cards for each account, listed both petitioner and Bernadette Spawn as owners, and indicated that the accounts were "Joint W/Right of Survivorship." Both petitioner and Bernadette Spawn signed the signature cards for both accounts. Pet. App. A2.

The Texas State Banking Commissioner declared Western Bank-Westheimer insolvent on October 1, 1987.[1] The Federal Deposit Insurance Corporation undertook a review of the bank's deposit account records to determine the amount of deposits that were federally insured. After reviewing the records of the Spawns' certificates of deposit, the FDIC determined under its regulations that because both accounts were listed as joint accounts, with the same owners, they must be aggregated for deposit insurance purposes. See 12 C.F.R 330.9(d) (1990). Because the aggregate amount of the accounts exceeded the $100,000 statutory maximum insurance amount, the FDIC determined that petitioner's certificate of deposit was uninsured. Pet. App. A2-A3.

2. On March 30, 1989, petitioner filed a complaint against the FDIC in its corporate capacity as insurer of deposit accounts. Petitioner alleged that the

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[1] Although the court of appeals states (Pet. App. A2) that the bank was declared insolvent three months after the Spawns' deposit, the dates given above and at Pet. 5-6 are correct. See *Spawn* v. *Western Bank-Westheimer*, 925 F.2d 885, 886 (5th Cir. 1991).

account that the FDIC had determined was jointly owned, and therefore uninsured, was in fact separately owned by him individually and therefore entitled to separate insurance coverage. The complaint also sought prejudgment interest and attorney fees. Pet. App. A3.

The FDIC filed a motion for summary judgment, which was granted by the district court. The district court held that the FDIC properly looked to the deposit records and signature cards to find that the accounts were jointly owned. Pet. App. A3-A4.[2]

On appeal, the Fifth Circuit reversed. *Spawn* v. *Western Bank-Westheimer*, 925 F.2d 885 (1991) (*Spawn I*). The court reviewed the FDIC's deposit insurance decision under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), noting that the decision could be set aside only if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance

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[2] The FDIC relied on two provisions of its deposit insurance regulations to argue that it need not look beyond the bank's account records in determining that petitioner's account was jointly owned:

> 12 C.F.R. 330.1(b) (1990) *Records.* (1) The deposit account records of the insured bank shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded * * *.
>
> 12 C.F.R. 330.9(b) (1990) *Qualifying joint accounts.* A joint deposit account shall be deemed to exist, for purposes of insurance of accounts, only if each coowner has personally executed a deposit account signature card and possesses withdrawal rights. The restrictions of this paragraph shall not apply to coowners of a time certificate of deposit or to any deposit obligation evidenced by a negotiable instrument, but such a deposit must in fact be jointly owned.

with the law." 925 F.2d at 887. The court nevertheless rejected the FDIC's interpretation of its regulation concerning joint ownership of certificates of deposit (12 C.F.R. 330.9 (1990))—an interpretation permitting reliance on the deposit account records of the insured bank—holding instead that the regulation required the FDIC to determine whether the account was *in fact* jointly owned under state law.[3] 925 F.2d at 888-889. On remand, the FDIC considered the records submitted by petitioner and determined that under the test set out by the Fifth Circuit, petitioner's account was individually owned and was entitled to additional deposit insurance. Pet. App. A5.

3. The only remaining issues before the district court were petitioner's requests for prejudgment interest and attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412. After trial on those issues, the district court stated its findings of fact and conclusions of law. Pet. App. B1-B12. The court found that the FDIC's statute did not provide an express waiver of sovereign immunity for interest awards. However, because the FDIC's statute contains a "sue and be sued" clause and because the district court concluded that the FDIC was engaging in the "business of insurance," and not in any governmental activity, the court found it liable for prejudgment interest in this case. Pet. App. B6-B11. The court also found that petitioner was entitled to attorney fees, stating (Pet. App. B2):

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[3] The court explained (925 F.2d at 889):

> In sum, the FDIC's interpretation of the regulations at issue contradicts the unambiguously expressed directions they contain. We may not defer to that erroneous interpretation, which is not "in accordance with the law."

> FDIC has not established that its position was substantially justified. The Fifth Circuit found that FDIC's decision to deny insurance coverage on [petitioner's] certificate of deposit was arbitrary and capricious or otherwise not in accordance with law. The Fifth Circuit further found that FDIC's interpretation of the regulation contradicted the unambiguously express directions that they contained. That is the reason for my finding.

4. The court of appeals reversed both awards. The court applied the general rule that "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Congress* v. *Shaw*, 478 U.S. 310, 311 (1986). Since Congress did not expressly waive the FDIC's immunity from interest awards (Pet. App. A10), the court considered the "commercial enterprise" exception to the no-interest rule relied on by the district court and discussed in *Loeffler* v. *Frank*, 486 U.S. 549 (1988). The court concluded that "the FDIC does not constitute a commercial enterprise within the meaning of *Loeffler*" (Pet. App. A17), and is therefore immune from prejudgment interest awards when making deposit insurance determinations. Pet. App. A19.

Turning to the issue of attorney fees, the court reviewed the applicable standards under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), as explicated in *Pierce* v. *Underwood*, 487 U.S. 552 (1988).[4] The court determined (Pet. App. A23-A24)

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[4] The appendix to the petition reproducing the opinion contains, in addition to numerous typographical errors, an omission from the opinion's description of this Court's holding in

that the district court's findings were "infected with an error of law" because the district court had concluded that simply "because the FDIC was unsuccessful in *Spawn I*, its position was not substantially justified." The court stated that its earlier decision "rested not on the unreasonableness of the FDIC's position, but rather on a need to make sense out of a confusing regulation." Pet. App. A24. After reviewing the record, the court of appeals held that the district court had abused its discretion in concluding that the FDIC's litigating position was not substantially justified. Pet. App. A23-A25.

ARGUMENT

The Fifth Circuit correctly applied settled law to the facts of this case. Petitioner's contention that the court of appeals' decision creates a conflict among the circuits, and is in conflict with prior rulings of this Court, is incorrect. The decision below is, however, in conflict with a subsequent decision of the Second Circuit on the EAJA issue (*Federal Election Commission* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (1993)). Accordingly, the Court may wish to hold this petition pending consideration of a petition shortly to be filed in *Political Contributions Data*.

Pierce v. *Underwood*. The first sentence on Pet. App. A21 should read as follows (the portions omitted from the appendix to the petition are italicized):

> [The Court in *Pierce* v. *Underwood*] explained that the government's position, to be "substantially justified," need not be " 'justified to high degree,' but rather 'justified *in substance or in the main*'—*that is, justified* to a degree that would satisfy a reasonable person."

1. Petitioner first contends, Pet. 10-11, that the Fifth Circuit misapplied this Court's decision in *Loeffler* v. *Frank*, 486 U.S. 549 (1988), in concluding that the FDIC is not subject to prejudgment interest as a "commercial enterprise." In *Loeffler*, this Court held that the Postal Service is subject to prejudgment interest. It reasoned (486 U.S. 556):

> By launching the Postal Service into the commercial world, and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's cloak of sovereignty and given it the status of a private commercial enterprise. It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards. [Internal quotation marks and citation omitted].

Under *Loeffler*, the question whether an agency is a "commercial enterprise" is determined by looking to congressional intent at the time of the agency's inception. 486 U.S. at 554, 556. In *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432-433 (1986), this Court undertook a *Loeffler*-type review of congressional intent in creating the FDIC:

> Faced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings. Congress passed the 1933 provisions "[i]n order to provide against a repetition of the present painful experience in which a vast sum of *assets and purchasing power* is 'tied up.'" S. Rep. No. 77, 73d Cong., 1st Sess., 12 (1933) (emphasis added [by Court]). * * * To prevent bank failure that resulted in the tangible loss of hard

> assets was therefore the focus of Congress' effort in creating deposit insurance.

The FDIC was created to resolve a critical national economic problem. This history is in marked contrast to the origins of the modern Postal Service:

> Congress has directed the Service to become a self-sustaining service industry and to "seek out the needs and desires of its present and potential customers—the American public" and to provide services in a manner "responsive" to the "needs of the American people." H.R. Rep. No. 91-1104, [pp. 19-20 (1970)].

United States v. *Kokinda*, 497 U.S. 720, 732 (1990) (plurality opinion of O'Connor, J.); see *Franchise Tax Board of California* v. *United States Postal Service*, 467 U.S. 512, 519-520 & n.13 (1984) (Congress "wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department."). Given these differences between the two agencies, *Loeffler* does not support the district court's award of prejudgment interest. Instead, the court of appeals correctly followed the *Loeffler* analysis, and concluded that the FDIC as insurer is not a "commercial enterprise" and is therefore immune to prejudgment interest awards.[5]

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[5] Moreover, as the court of appeals recognized (Pet. App. A17), *Loeffler* specifies that interest is recoverable under the "commercial enterprise" exception "to the extent that interest is recoverable against a private party as a normal incident of suit." 486 U.S. at 557. This suit was brought under the judicial review provisions of the Administrative Procedure Act, which contains no authorization for the recovery of prejudgment interest. Moreover, a suit to recover deposit insurance has no private party equivalent. Thus, even if the FDIC as insurer

Petitioner incorrectly contends, Pet. 11-12, that the decision below is in conflict with *North New York Savings Bank* v. *Federal Savings & Loan Insurance Corp.*, 515 F.2d 1355 (D.C. Cir. 1975) and *Far West Federal Bank* v. *Office of Thrift Supervision*, 930 F.2d 883 (Fed. Cir. 1991). Neither decision addresses the issue before the court in this case. In *North New York Savings Bank*, the court awarded prejudgment interest in circumstances far different from those in the instant case,[6] while *Far West* did not involve a

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were a "commercial enterprise," interest would not be recoverable against the FDIC because interest would not be recoverable against a private party as a normal incident of suit.

[6] In *North New York Savings Bank*, the bank's deposits were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), a predecessor of the FDIC. The bank prepaid future premiums to the FSLIC's Secondary Reserve, as required by statute. When it converted to FDIC insurance, the bank requested the return of its pro rata share of the Secondary Reserve and the accrued interest on that share. The FSLIC returned the pro rata share, but declined to pay the accrued interest. The court of appeals upheld the bank's claim for interest from the date it ceased to be a FSLIC-insured institution until FSLIC refunded the institution's share of the reserve. In awarding this interest, the court stated (515 F.2d at 1364):

> Mindful of the general rule that the United States is not liable for interest on claims against it in the absence of a statute or contract, we are satisfied that the rule is not applicable to this situation. Congress provided [in 12 U.S.C. § 1727(e)] that the pro rata shares of the Secondary Reserve earn interest at the FSLIC-determined rate (5.537954 percent for 1971). From October 1 through December 13, 1971, FSLIC held North New York's pro rata share and presumably earned interest thereon at that rate.

Thus, in *North New York* there was both a statutory basis for the payment of interest by the FSLIC, and no disagreement

claim for prejudgment interest at all.[7]

The Fifth Circuit's opinion in this case is entirely consistent with the decision of the only other court of appeals to address the precise issue. *Philadelphia*

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that the funds belonged to North New York after the date of conversion. In this case there is no statutory basis for the payment of interest on deposit insurance payments, and petitioner's entitlement to payment was in dispute. Although the *North New York* court found that the FSLIC was "to a degree" comparable to "traditional insurance companies" in the context of the risk the agency assumed, 515 F.2d at 1359, and stated that "FSLIC is in the insurance business and is assumed to have accepted the ordinary incidents of suits in such business," *id.* at 1364, that court did not address the question that *Loeffler* subsequently identified as the controlling consideration in this type of case: whether Congress intended the FSLIC to be a "commercial enterprise."

[7] *Far West* arose out of the government's attempt to enforce regulatory requirements on Far West. Far West sued, seeking restitution of certain investment funds and rescission of an agreement it had made with the Federal Home Loan Bank Board that modified regulatory requirements. At issue on appeal was whether Far West's claim was cognizable by the district court or could be brought only in the Claims Court. The Federal Circuit construed the FDIC's sue-and-be-sued clause as a general waiver of sovereign immunity and allowed the claim to be brought in district court. In reaching this decision, the court noted that the sue-and-be-sued clause "accommodates the commercial and business context in which [the FDIC and its predecessors] operate[]" (930 F.2d at 888), and has been construed as a waiver of sovereign immunity in a number of circumstances (referring to *North New York* as one example). But the court had no occasion to address whether the FDIC would be liable for prejudgment interest in any circumstances, and certainly not whether it would be liable in the narrow context to which the court below confined its decision—that of "erroneous deposit insurance determinations." Pet. App. A19.

Gear Corp. v. *FDIC*, 751 F.2d 1131 (10th Cir. 1984), rev'd on other grounds, *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986). In *Philadelphia Gear*, the Tenth Circuit rejected the district court's award of prejudgment interest in a deposit insurance case, on the ground that the Federal Deposit Insurance Act does not provide an express waiver of sovereign immunity for the award of interest. 751 F.2d at 1138-1139. More recently, in *Sandia Oil Co.* v. *Beckton*, 889 F.2d 258 (1989), the Tenth Circuit considered a claim for post-judgment interest on a flood insurance claim under a program of the Federal Emergency Management Agency. Like the deposit insurance program at issue here, the flood insurance program is a subsidized program "designed to accomplish important national goals at some cost to the national treasury." *Id.* at 263-264. After considering both the "express waiver" exception to the general no-interest rule discussed in *Shaw* and the "commercial enterprise" exception discussed in *Loeffler*, the court concluded that the underlying statute contained no express waiver that would allow the payment of interest, *and* that the flood insurance program was not a commercial enterprise. *Ibid.*[8] The Fifth Circuit

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[8] The *Sandia* court distinguished *Standard Oil Co.* v. *United States*, 267 U.S. 76 (1925), on which the *North New York* court had relied for its conclusion that the FSLIC is to be "assumed to have accepted the ordinary incidents of suits in [the insurance] business" (515 F.2d at 1364). In *Standard Oil Co.*, the Court awarded prejudgment interest on claims for government war risk insurance, but in a later case, *United States* v. *Worley*, 281 U.S. 339 (1930), the Court declined to award prejudgment interest on claims for veterans' life and disability insurance under a subsidized government insurance program. *Standard Oil* was distinguished in *Worley* on the

cuit decision in this case is fully in accord with both these Tenth Circuit decisions.

2. Petitioner also contends, Pet. 14-19, that the court of appeals erred in reversing the district court's award of attorney fees under the Equal Access to Justice Act (28 U.S.C. 2412), because the district court applied an incorrect standard in determining that the government's position was not "substantially justified." In petitioner's view, the district court considered the whole record of the merits litigation, including the decision of the court of appeals on the merits, in reaching its decision that the government's position lacked substantial justification; petitioner contends that the court of appeals reversed on the ground that the appellate merits decision was irrelevant to the EAJA decision. On the basis of that analysis of the decision below, petitioner asserts a conflict with *Sierra Club* v. *Secretary of the Army*, 820 F.2d 513 (1st Cir. 1987), in which the court recognized that the merits decision is one factor to be considered in determining whether the government's position was substantially justified.

Petitioner's argument mischaracterizes the decision of the court of appeals in this case. The court did not hold that its prior merits decision was irrelevant to the substantial justification determination—indeed, it specifically considered that decision in

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ground that the insurance for veterans had a beneficial statutory purpose and was carried out at some cost to the government, while the war risk insurance in *Standard Oil* was a profit making venture. *Id.* at 342-343. As the *Sandia* court explained, 889 F.2d at 262-263, the subsidized flood insurance program more closely resembles the *Worley* model than the profit making *Standard Oil* insurance. The same is true of the deposit insurance at issue here.

determining that the government's position was substantially justified (Pet. App. A23-A24). The fault the court found with the district court's analysis of the substantial justification issue was not that the court considered the prior appellate opinion, but that it relied *solely* on that decision, finding that "because the FDIC's position * * * was held to be 'arbitrary and capricious' and 'not in accordance with law,' it was *ipso facto* not substantially justified" (Pet. App. A22-A23). The court expressly agreed with the First Circuit's decision in *Sierra Club* (Pet. App. A23). As both courts recognize, the merits decision may be a relevant factor in the EAJA analysis, but it is not the only one.

While petitioner may dispute the court of appeals' conclusion that the district court's substantial justification decision turned solely on the merits decision, that fact-specific conclusion does not merit review by this Court. Petitioner does not contend that a district court may properly find a lack of substantial justification solely because the agency decision has been overturned on APA review. Accordingly, petitioner does not object to the legal standard actually applied by the court of appeals; he simply objects to its application to the facts of this case.

3. In any event, the decision of the court of appeals in this case is correct. It is consistent with *Pierce* v. *Underwood*, 487 U.S. 552 (1988), and the great weight of post-*Pierce* cases interpreting the substantial-justification standard in cases involving the review of administrative actions under the Administrative Procedure Act's "arbitrary and capricious" standard. See, *e.g.*, *Abernathy* v. *Clarke*, 857 F.2d 237, 239 (4th Cir. 1988); *Hadden* v. *Bowen*, 851 F.2d 1266, 1267-1268 (10th Cir. 1988) (listing cases indicating pre-*Pierce*

agreement among circuits that lack of substantial evidence supporting government position on APA review does not establish lack of substantial justification); *Trahan* v. *Brady*, 907 F.2d 1215, 1219-1220 (D.C. Cir. 1990); *Louisiana* v. *Lee*, 853 F.2d 1219, 1222 (5th Cir. 1988).

Recently, however, the Second Circuit adopted the position rejected by the court of appeals in this case. In *Federal Election Commission* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (1993), the Second Circuit held that, in addressing the substantial justification issue in the EAJA phase of the case, the district court was "bound by the merits panel's conclusions" (*id.* at 387). The Second Circuit thus adopted the test rejected by the court of appeals in this case (Pet. App. A22-A23): because the government's position was found to be arbitrary and capricious on APA review, the Second Circuit held that it was *ipso facto* not "substantially justified."

The Federal Election Commission plans to file a certiorari petition in *Political Contributions Data, Inc.*[9] Because, as we have explained, petitioner mischaracterizes the standard rejected by the court in this case, and consequently does not defend the standard adopted by the Second Circuit, this case is not an appropriate vehicle for resolving the conflict that has been created by *Political Contributions Data, Inc.* Indeed, since the EAJA issue presented by petitioner does not merit review by this Court, certiorari should be denied. Cf. *Izumi Seimitsu Kogyo* v. *U.S. Philips Corp.*, No. 92-1123, cert. dis-

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[9] The Solicitor General has, to the extent legally required, authorized the General Counsel of the Commission to file the petition on the Commission's behalf.

missed as improvidently granted (Nov. 30). Nevertheless, in light of the current conflict in the circuits, the Court may wish to hold this case pending its action on the petition to be filed in *Political Contributions Data, Inc.*

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the petition should be disposed of as appropriate in light of this Court's action on the petition to be filed in *Federal Election Commission* v. *Political Contributions Data, Inc.*, 995 F.2d 383 (2d Cir. 1993).

Respectfully submitted.

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DECEMBER 1993

Supreme Court, U.S.
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(3)

No. 93-471

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COY U. SPAWN, JR.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

REPLY BRIEF OF THE PETITIONER

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I. The Interest Issue.

The issue is whether the waiver of sovereign immunity effected by the FDIC's "sue and be sued" clause includes normal incidents of suit, including interest. Petitioner and the government agree that the Fifth Circuit's opinion hinged on whether Congress launched the FDIC and FSLIC "into the commercial world". (Opposition Brief, pp. 5 & 8). The government agrees with Petitioner that there is a conflict among the Fifth, D.C., and Federal Circuit Courts of Appeals on this issue. (Opposition Brief, pp. 9-11). The government attempts to distinguish these cases by the specific facts, but cannot distinguish the controlling issue (waiver of sovereign immunity from the normal incidents of suit) or the determinative answer (whether the FDIC and FSLIC were launched into the commercial world) among these cases. *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp.*, 989 F.2d 830, 838 (5th Cir. 1993) (hereinafter *"Spawn II"*); *Far West Federal Bank v. Office of Thrift Supervision*, 930 F.2d 883, 888-889 (Fed. Cir. 1991); *North New York Sav. Bank v. Federal Sav. & Loan Ins. Corp.*, 515 F.2d 1355, 1364 (D.C. Cir. 1975).

Regarding *North New York Savings Bank*, the Fifth Circuit specifically recognized a conflict on this issue. *Spawn II*, 989 F.2d at 838 and n. 11.

The government's arguments in the Opposition Brief highlight the need for this Court to clarify the application of *Loeffler*. *Sandia Oil* involved an agency not enacted by or provided with a sue-and-be-sued clause. The Tenth Circuit's holding that the absence of a sue-and-be-sued clause is not determinative of the "commercial enterprise" exception to sovereign immunity exemplifies the circuit courts' misunderstanding of *Loeffler*. *Sandia Oil Co., Inc. v.*

Beckton, 889 F.2d 258, 262 (10th Cir. 1989); *cf. McGehee v. Panama Canal Comm'n.*, 872 F.2d 1213, 1218 (5th Cir. 1989). *Philadelphia Gear* involved only a *Shaw* express waiver analysis and did not discuss the "commercial enterprise" exception to waiver of sovereign immunity. *Philadelphia Gear Corp. v. Federal Deposit Ins. Corp.*, 751 F.2d. 1131 (10th Cir. 1984), *rev'd on other grounds*, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 490 (1988).

Application of *Loeffler* is unclear regarding the limitation on paying interest "... to the extent that interest is recoverable against a private party as a normal incident of suit." *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1945, 1970, 100 L.Ed. 2d 549 (1988). The government's position is that Mr. Spawn could not be entitled to interest because: the Administrative Procedure Act applies procedurally to Mr. Spawn's suit for recovery of deposit insurance and does not include a specific authorization for the recovery of interest; and a suit for federal deposit insurance is not available against a private party. The effect of the government's position is that when the Administrative Procedure Act applies procedurally to any cause of action versus the government, the prevailing party automatically is not entitled to interest. Petitioner's interpretation is to analyze the cause of action as if a private party was the defendant. For example, in this Case, if the bank had not been closed, the bank and not the FDIC would have been the defendant liable on the deposit. The cause of action is for failure to pay on a certificate of deposit which matured and became due. Under Texas law, when a depository institution fails to pay a matured certificate of deposit, pre-judgment interest must be paid as a matter of law. The importance of clarifying *Loeffler* extends to all governmental "sue-and-be-sued" agencies.

II. The EAJA Issue.

The EAJA issues presented to this Court in this Case involve the standard of review and burden of proof on "substantial justification" for a governmental agency's position which has been reversed on the merits as "arbitrary and capricious" or "not in accordance with the law". It is the application of the "abuse of discretion" standard of review which is at issue. The government's Opposition Brief reinforces that this Court should grant certiorari on these EAJA issues, which are encompassed by four cases. *Federal Election Comm'n v. Political Data Contributions Data,* 995 F.2d 383 (2d Cir. 1993); *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp.*, 989 F.2d 830 (5th Cir. 1993); *Oregon Natural Resources Council v. Madigan*, 980 F.2d 133 (9th Cir. 1992); *Sierra Club v. Secretary of Army,* 820 F.2d 513 (1st. Cir. 1987). These four cases reflect a variance among the circuit courts of appeals on the degree of deference which must be accorded a district court's EAJA findings of fact on "substantial justification" for a government's position,[1] which has been reversed as being

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[1] In *Oregon Natural Resources Council v. Madigan*, the government lost on the merits for failing to issue regulations in violation of a statute which set forth a mandatory duty to issue such regulations. On remand, the district court held that the government's position was "substantially justified". The Ninth Circuit did not defer to this EAJA finding and reversed. "[W]e find that the underlying position of the government was not substantially justified. We come to this conclusion not because the government lost its claim, but because a previous panel of this court determined that the statutory language and legislative history were clear." 980 F.2d at 1332.

In *Federal Election Comm'n v. Political Data Contributions*, the court of appeals held against the government on the merits on grounds that the Federal Election Commission failed to provide "a reasonable interpretation" of its own regulation or the controlling statute and that the government's interpretation likely violated the First Amendment of the

"arbitrary and capricious" or "not in accordance with the law".[2]

The key to reconciling these four circuit court opinions may be in the plain language of the 1985 amendments to the EAJA statute.

United States Constitution. On remand, the District Court held that the government's position was "substantially justified". The Second Circuit did not defer to the district court's EAJA ruling and reversed. The majority's reasoning was: (1) on the merits the court of appeal's ruled that the Federal Election Commission's interpretation of its regulation was "unreasonable"; (2) under the EAJA, the test for "substantial justification" is one of "reasonableness"; (3) therefore, the EAJA finding is bound by the finding on the merits. "[T]he legal standards which govern the merits phase of this litigation are precisely those to be applied to the EAJA question." 995 F.2d at 386.

[2]In this Case, the merits of whether Mr. Spawn was entitled to deposit insurance from the FDIC hinged on statutory construction. On the merits, the Fifth Circuit held in *Spawn I* that the regulation "plainly establish[ed] a different test" from the FDIC's policy, and that the FDIC's litigation position was contradicted by the "unambiguously expressed" terms of the regulation. *Spawn v. Western Bank Westheimer,* 925 F.2d 885, 888 & 889 (5th Cir. 1991) On remand, the District Court ruled that on the evidence presented at the EAJA trial the FDIC did not prove substantial justification. Thus, the District Court relied on the previous Court of Appeals' merits ruling. (See Petition Appendices B and D). In *Spawn II*, the Fifth Circuit: (1) accorded no weight to the District Court's finding that the FDIC did not meet its burden of proof that its position was substantially justified; and (2) determined *de novo,* by recharacterizing the previous panel's holdings, that the government was substantially justified. *Spawn II*, 989 F.2d at 840.

In direct conflict, the First Circuit Court of Appeals in *Sierra Club* deferred to the District Court's finding on virtually identical facts that the governmental agency had not met its burden of proof on "substantial justification" of an agency position which was held to be "arbitrary and caprici2ous". 820 F.2d at 518.

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(B).

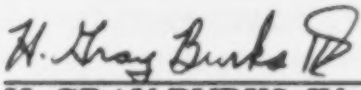
Therefore, the issue of deference to the District Court's EAJA fact findings on whether the government met its burden of proof on "substantial justification" is a question of strict statutory construction.

The government suggests that this Court hold the Petition for a Writ of Certiorari in *Spawn II* pending the Petition for Certiorari which the government intends to file in the Second Circuit Case *Federal Election Comm'n v. Political Contributions Data*. Both cases involve the disparity with which circuit courts of appeals are applying the "abuse of discretion" standard in EAJA cases. However, the Second Circuit opinion turns on the issue of whether the "reasonable interpretation" standard applicable to the merits of the *Federal Election Commission* case was identical to the "reasonableness" standard on the EAJA issue. *Spawn II* involves initially the interplay between the "arbitrary and capricious" or "not in accordance with law" standard with the "substantially justified" standard. More importantly, the record in this Case (see Petition Appendix D) engages the overall "degree of deference" issue which the narrow basis for the Second Circuit's reversal of the district court in *Federal Election Commission* does not.

CONCLUSION/PRAYER

For the foregoing reasons, Mr. Coy U. Spawn, Jr. respectfully requests this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the two issues presented in this Case.

Respectfully submitted,



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